

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Implementation of the)
Pay Telephone Reclassification)
and Compensation Provisions of the)
Telecommunications Act of 1996)
)

CC Docket No. 96-128 **FEDERAL COMMUNICATIONS COMMISSION**
OFFICE OF SECRETARY

COMMENTS OF ONCOR COMMUNICATIONS, INC

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July 1, 1996

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SUMMARY

Oncor Communications, Inc. ("Oncor") is a provider of interstate and intrastate interexchange services, primarily operator-assisted services from public telephones including local exchange carrier ("LEC")-owned pay phones and privately-owned pay phones. Oncor's comments focus on one substantive area of inquiry raised by the Notice¹, that is, the right of Bell Operating Companies ("BOCs") to negotiate with location providers to be the presubscribed carrier of interLATA and intraLATA service from pay telephones.

Section 276 of the Telecommunications Act of 1996 ("1996 Act") allows the Commission to establish procedures allowing BOCs to negotiate with location providers on the location providers' selecting and contracting with interLATA carriers if, and only if, the Commission determines that such BOC negotiation with location providers would serve the public interest. Allowing the BOCs to negotiate with location providers with regard to the provision of interLATA service from BOC public telephones cannot be found to serve the public interest. In addition, the issue of whether BOCs should be permitted to make interexchange carrier selections for service from BOC pay telephones is premature.

First, an inevitable consequence of allowing the BOCs to negotiate with location owners regarding interexchange carrier selection from pay phones would be for the BOCs to effectively displace the location owners as the *de facto* selectors of interexchange service providers from pay phones placed on location owners' premises. As a direct result of the BOCs' market power in the pay phone market, if BOCs are allowed to negotiate with location providers they would

¹Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (*Notice of Proposed Rulemaking*), FCC 96-253, released June 6, 1996 (hereinafter "NPRM" or "Notice").

have the ability to deprive the location providers of the carrier selection right that location providers have had for nearly eight years.

Second, regardless of whether the right to negotiate with location providers would serve the public interest, if the Commission provides the BOCs with carrier selection rights, BOCs would route all interLATA traffic from their pay phones to themselves if allowed to do so. There is nothing in the 1996 Act that contemplates allowing the BOCs to unilaterally displace location providers in the selection of interexchange service providers from BOC pay phones. Such self-selection by the BOCs is contrary to the overall objectives of the Act and the requirements of Section 276 in particular.

Third, the 1996 Act permits BOCs to offer interLATA services only when appropriate safeguards are established by the Commission. At this time, the Commission has not established these requisite safeguards. As such, it is premature for the Commission to address the issue of whether BOCs may offer interLATA service from their pay phones until it establishes appropriate safeguards to govern BOC provision of interLATA service generally.

Finally, Oncor concurs with the Commission's tentative conclusion that Section 276(b)(3) grandfathers all contracts in existence as of the date of enactment of the 1996 Act, February 8, 1996. However, it must be made clear that nothing in the 1996 Act should be interpreted to impair the obligations of properly-executed agreements, including letters of authorization, between location providers, pay telephone service providers, and interexchange carriers for the term of those agreements.

Comments of Oncor Communications, Inc.
July 1, 1996

Rather than diverting Commission resources to address issues that are currently premature, Oncor urges the Commission to focus its energies on the local competition, interconnection, BOC interLATA entry and safeguard proceedings, as well as other issues and proceedings that must be resolved prior to consideration of the BOCs' role in the pay telephone market.

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COMMENTS OF ONCOR COMMUNICATIONS, INC

Oncor Communications, Inc. ("Oncor"), by its attorneys, hereby submits its initial comments in this proceeding and states as follows:

INTRODUCTION

Oncor is a provider of interstate and intrastate interexchange services, primarily operator-assisted services from public telephones -- local exchange carrier ("LEC")-owned pay phones, as well as privately-owned pay phones. Oncor and other providers of operator-assisted calling services will be profoundly affected by the Commission's resolution of several of the issues raised in the notice of proposed rulemaking issued in this proceeding.² In an effort to focus the Commission's attention on the issues of greatest concern to Oncor, these comments will be limited to the one substantive area of inquiry raised by the Notice of primary importance to Oncor -- the right of Bell Operating Companies ("BOCs") to negotiate with location providers to be the presubscribed carriers of interLATA and intraLATA service from pay telephones.

²Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Notice of Proposed Rulemaking), FCC 96-253, released June 6, 1996 (hereinafter "NPRM" or "Notice").

As will be discussed more fully in these comments, based upon current circumstances, allowing the BOCs to negotiate with location providers with regard to provision of interLATA service from public telephones cannot be found to serve the public interest. Indeed, consideration of whether, and under what circumstances, the BOCs should be permitted either to negotiate with location providers or to make interexchange carrier selections for service from BOC pay telephones is premature. No BOC anywhere is even allowed to provide in-region interLATA service and it is problematic when -- or even whether -- the BOCs will be permitted to provide in-region interLATA service. Moreover, although the Telecommunications Act of 1996 specifically directs the Commission to promulgate safeguards to govern interLATA entry by the BOCs, such safeguards have not yet been proposed, nor has the Commission even commenced any proceeding to consider such safeguards. Stated simply, the issues of BOC negotiation with location providers and BOC involvement in the selection of interexchange service providers from BOC pay telephones is not yet "ripe." Rather than diverting Commission resources to address what are at this time theoretical questions, Oncor urges the Commission to focus its energies on the local competition, interconnection, BOC interLATA entry and safeguard proceedings as well as other issues and proceedings which must be resolved prior to consideration of the BOCs' role in the pay telephone market.

I. BOC Negotiation with Premises Owners Would Not Serve the Public Interest

Pursuant to Section 276 of the Communications Act added to the Act by the Telecommunications Act of 1996, the Commission may establish procedures allowing BOCs to

negotiate with location providers on the location providers' selecting and contracting with interLATA carriers if -- and only if -- the Commission determines that such BOC negotiation with location providers would serve the public interest. Section 276(b)(1)(D) requires the Commission to establish regulations to:

provide for Bell Operating Company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest.³

Allowing BOCs to negotiate with location providers would not serve the public interest.

Section 276(b)(1)(D) must be construed and applied in conjunction with and in a manner which is consistent with all other provisions and policies of the Telecommunications Act of 1996, including the policy against abuse of market dominance by incumbent local exchange carriers, like the BOCs.

In considering whether or not BOC negotiation with location providers either to select the interexchange service provider or to provide interexchange service themselves from public telephones is in the public interest, the Commission must remain mindful it is the location owner -- not the OSP and not the BOC -- that is to retain the ultimate authority to select the interexchange carrier. This is confirmed by the Conference Report accompanying the 1996 Act

³47 U.S.C. § 276(b)(1)(D).

which states that "the location provider has the ultimate decision-making authority in determining interLATA services in connection with the choice of payphone providers."⁴

Since October 1988, owners of the premises upon which BOC pay telephones are located have enjoyed the right to select the interexchange carriers to provide service, including operator-assisted service, from the BOC pay phones located on their property.⁵ The Premises Owner Presubscription Order reflects the recognition by the court having jurisdiction over the Modification of Final Judgement in United States v. American Telephone and Telegraph Company⁶ that premises owner presubscription, despite certain shortcomings which were acknowledged by the court, is the most appropriate means for bringing the pro-competitive benefits of the MFJ's equal access requirements to BOC pay telephones. Nothing in the 1996 Act, including the provisions of that Act which contemplate the possibility of eventual BOC entry into interLATA markets,⁷ is intended to deprive premises owners of the right to select the interexchange carriers serving the pay phones located on their property -- a right that they have enjoyed since 1988. Yet, an inevitable consequence of allowing the BOCs to negotiate with location owners regarding interexchange carrier selection from pay phones would be for the

⁴See Jt. Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) ("Conference Report"), as quoted at Notice at ¶ 68.

⁵See United States v. Western Electric Co., Inc. 698 F. Supp. 348 (D.D.C. 1988) ("Premises Owner Presubscription Order").

⁶552 F. Supp. 131 (D.C.C. 1982), *aff'd. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (hereinafter "MFJ").

⁷See, e.g., 47 U.S.C. §§ 271, 272.

BOCs effectively to displace the location owners as the *de facto* selectors of interexchange service providers from pay phones placed on location owners' premises.

If the BOCs are allowed to negotiate with location providers, they would have the ability as a direct result of their retained market power effectively to deprive the location providers of that carrier selection right which location providers have had for nearly eight years. There are many negotiating "tactics" which would be available to the BOCs in their dealings with location providers which would not be available to any other parties seeking to negotiate with those location providers. For example, the BOCs could -- and quite possibly would -- exert leverage over location providers by their control of the pay phone instruments. It is difficult to imagine a more intimidating negotiating strategy than the threat to remove pay phones from the location owners' premises unless the location owners agree to allow the BOC to select the interexchange provider. Not only would removal of BOC pay phones cause the location owners to lose the revenue from those phones, but, perhaps more importantly, the location owners would lose the goodwill of their customers and guests who rely upon the availability of BOC pay phones. Certainly, no other entities negotiating with location providers would have such leverage available to them.

Additionally, the BOCs remain providers of what are still essential monopoly local exchange services upon which location providers as local exchange service customers remain dependent. To the extent that the BOCs control the quality and availability of those services, timeliness of installations and repairs, and even the pricing of those services, they would have

both the incentive and the ability to use those indicia of bottleneck control to influence location provider selections.

Even if the Commission were to conclude that Section 276 could be construed to allow BOCs to negotiate with location providers regarding provision of interexchange services from their pay telephones, it would not be in the public interest to allow them to so. Each BOC would enter into such "negotiations" for public telephones in its service area with negotiating leverage unavailable to any other interexchange carrier. No other carrier would be in a position to combine pay phone carrier selection with favorable pricing and provisioning of monopoly services, including local exchange services and adjuncts to local exchange service. If allowed to "negotiate" long distance selections with location providers, the BOCs would have the ability and the incentive to bundle such selections with favorable pricing of local exchange service, directory listings and advertising, service installation intervals, and a myriad of other local exchange-related telecommunications service benefits and perquisites which can be provided only by the incumbent LEC. Stated simply, BOCs, if allowed to negotiate with location providers, would be expected to underwrite the cost of providing those incentives with revenues from services in which they will retain market dominance. This would be the case notwithstanding the fact that the legislative history of the 1996 Act documents a clear intent to prevent such conduct.⁸

⁸See, e.g., Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Rept. 104-23 at 58 ("Senate Report"): "In order to address the competitive imbalance, the Bell operating companies are prohibited from cross-subsidizing and from preferring or discriminating in favor of their own pay phone operations."

Furthermore, the right to negotiate with location providers would afford the BOCs the opportunity to unduly benefit themselves in their provision of out-of-region interexchange service. The ability to negotiate with location providers would enable BOCs to acquire the right to control interexchange carrier selections for thousands of pay telephones in their regions. Even while they remain forbidden from providing interLATA service from those phones themselves, control of carrier selection derived from the right to negotiate with location providers would afford the BOCs a unique negotiating position in their acquisition of interexchange capacity from underlying carriers for their out-of-region services. For example, the unfettered right of BOCs to negotiate with location providers regarding the provision of interexchange services from pay telephones could provide BOCs with incentives to select certain interexchange carriers for the carriage of traffic from BOC pay telephones as a *quid pro quo* for favorable rates from those same interexchange carriers for the transport of interexchange traffic in connection with BOC out-of-region service. If this were to occur, BOCs would be abusing their dominant position in the pay telephone market in their regions in order to capture a significant operational and cost advantage over their competitors in their out-of-region long distance operations.

Unless and until the Commission is able to determine, based upon a factual record, that the BOCs no longer are in a position to utilize such tactics in their negotiations with location providers, the Commission cannot responsibly conclude that allowing the BOCs to negotiate with location providers would serve the public interest.

II. The 1996 Act Certainly Does Not Authorize the BOCs to Select
the Interexchange Carriers to be Presubscribed to their Pay
Telephones

Whether or not affording the BOCs the right to negotiate with location providers would serve the public interest (as explained above, it would not do so), there is no doubt that nothing in the 1996 Act contemplates allowing the BOCs unilaterally to displace location providers in the selection of interexchange service providers from BOC pay phones, notwithstanding the suggestion contained in the Notice. At ¶ 72 of the Notice, the Commission asks, "if the Commission provides the BOCs with carrier selection rights, should we be concerned that the BOCs, if they are able to provide interLATA service, will direct such service to themselves?" Implicit in asking this question is the Commission's suggestion that BOCs, if allowed to do so, would select themselves if and when they are allowed to provide in-region services. Of course, they would.

Unquestionably, the BOCs would route all interLATA traffic from their pay phones to themselves if allowed to do so.⁹ However, such self-selection by the BOCs is not contemplated

⁹In 1993, one BOC -- Ameritech -- candidly stated in the context of its then-proposed "Customers' First" plan that it would presubscribe all of its pay telephones to its long distance affiliate. See Ameritech Petition for a Declaratory Ruling and for Related Waivers to Establish a New Regulatory Model for the Ameritech Region, filed March 1, 1993. Attached to that petition is Ameritech's "Equal Access Plan." In that plan, Ameritech describes its intent to presubscribe its thousands of pay telephones throughout its region to itself, irrespective of the preferences of premises owners, as follows:

Ameritech will be free to select the presubscribed interexchange carrier on its pay phones, as private pay phone owners and interexchange carriers' pay phones do today, and to negotiate business terms with the interexchange carriers of its choosing [including presumably itself or its affiliate]. Ameritech would then be
(continued...)

by the 1996 Act, and indeed, would be antithetical to the overall objectives of the Act and to the requirements of Section 276 in particular. Currently, each of the BOCs owns and operates in excess of eighty percent of the pay telephones in its region. Whether or when those dominant market shares will change in the foreseeable future following implementation of the 1996 Act is speculative. What is not subject to speculation or conjecture is that currently the BOCs dominate the ownership of pay telephones and the provision of public telephone service in their regions. Notwithstanding the limited availability of privately-owned pay telephones, public telephone service remains virtually a monopoly service of the BOCs in their regions. To allow those BOCs which continue to hold pay telephone market shares in excess of eighty percent unilaterally to displace the incumbent providers of interexchange services from those public telephones in contravention of the desires of the owners of the premises upon which those phones are located would afford the BOCs the power to instantly monopolize the provision of interexchange service, including operator-assisted service, from public telephone locations throughout their regions.

In order to appreciate how antithetical BOC selection of interexchange service providers for their pay telephones would be to competition in that important market segment, it must be remembered why premises owner presubscription was mandated in 1988 and the arrangement it replaced. Prior to the Premises Owner Presubscription Order, each of the BOCs routed all

⁹(...continued)

free to offer compensation to premises owners and to earn profits on all traffic similar to what private pay phone and IXC pay phone operators do today.

Ameritech Customers' First Equal Access Plan at 3.

interexchange traffic from their pay telephones to one interexchange carrier -- AT&T. The automatic routing of that traffic to AT&T (irrespective of premises owner choice, irrespective of consumer choice) was a legacy from the pre-divestiture era when most interexchange services, including all direct-dial and operator-assisted services, were provided jointly by AT&T, the BOCs and the independent LECs. The decision to route interexchange calls to AT&T was not made by location providers; it was not made by calling or called parties, it was made by the BOCs themselves.

The MFJ court wisely recognized that BOC selection of the entity providing interexchange service from their public phones was contrary to the concepts of equal access and interexchange competition which underlaid the decree. To now permit the BOCs to reclaim that ability to dictate interexchange carrier selections from their public phones would signal a return to an era when service provider choices were made not by premises owners, not by consumers, but by the BOCs. Not unlike the circumstances which existed prior to 1988, the BOCs again would be able to bypass the choices of location providers in order to select themselves. It is difficult to imagine an outcome more at odds with the notions of competition and consumer choice than BOC selection of BOCs as the presubscribed interexchange carriers from BOC public telephones.¹⁰

¹⁰Oncor recognizes that there may be situations where the BOCs are entitled to make pay telephone interexchange carrier selections where they are also the location providers (for example, pay telephones located in BOC office buildings). Oncor agrees that BOCs as location providers should have the same right at other location providers to make carrier selections and to select themselves, provided, of course, that they have obtained the requisite authorizations and approvals necessary to provide interexchange services.

The most efficient way to preclude BOCs from acting on those incentives to cross-subsidize and discriminate in favor of their pay phone operations is to forbid them from exploiting their retained pay phone dominance to buy market share (or perhaps even market domination) of the long distance calling market from pay phones.

III. Until the Commission Establishes Appropriate Safeguards to Govern BOC Provision of InterLATA Service, Consideration of Whether BOCs May Offer InterLATA Service From Their Pay Phones is Premature

As described above, questions about whether or not the BOCs should be allowed to negotiate with location owners regarding the provision of interexchange service from their BOC pay phones or provide interexchange service from their pay phones themselves are inextricably interlinked with the more fundamental issues surrounding whether, when, under what circumstances, and subject to what safeguards, will the BOCs be permitted to offer interLATA services. Under the 1996 Act, the BOCs may apply to the Commission for permission to provide in-region interLATA service on a state-by-state basis only when they are able to demonstrate either the presence of a facilities-based competitor with whom they have entered into an interconnection agreement¹¹ or, beginning ten months after enactment, if they can show that no provider has requested interconnection and that there exists a generally-available state-

¹¹47 U.S.C. § 271(c)(1)(A).

approved interconnection arrangement.¹² In addition, BOCs seeking interLATA authority must demonstrate compliance with a fourteen point competitive checklist.¹³

Presently, rules governing interconnection have not been promulgated, no interconnection agreements have been approved by any state commissions, and the Commission has not even proposed procedures for consideration of BOC interLATA requests. Moreover, Section 272 of the Act requires BOCs offering interLATA services to do so through separate subsidiaries and subject to accounting and other safeguards to be established by the Commission. The Commission has not yet adopted separation, cost accounting rules, or other safeguards. It is not scheduled to announce interim cost allocation rules until August 1996 and final rules until March 1997. Non-structural safeguards are not scheduled to be proposed until the third quarter of 1996.¹⁴

Assuming that the BOCs eventually become authorized to provide in-region interLATA service, whether and under what circumstances they should be permitted to negotiate with pay phone location owners and/or offer interLATA service themselves from BOC pay phones inevitably will depend on the specific safeguards to be adopted. Hopefully, such safeguards will be designed to protect anticompetitive actions by BOCs in the public telephone arena. Until such time as those safeguards are established and their applicability to the public telephone market

¹²47 U.S.C. § 271(c)(1)(B).

¹³47 U.S.C. § 271(c)(2)(B)(i - iv).

¹⁴See News Release - FCC Releases Most Recent Telecom Act Implementation Schedule, Mimeo 63079, released May 22, 1996.

segment can be determined, consideration of BOC involvement in the provision of interLATA service from their pay phones is premature.

IV. All Existing Contractual Relationships Between Location Providers and Interexchange Carriers Must be Honored

Finally, Section 276(b)(3) of the 1996 Act provides that "nothing in this section shall affect any existing contracts between location providers and payphone service providers and interLATA or intraLATA carriers that are in force and effect as of the date of enactment. . . ."¹⁵ The Commission tentatively concludes that this statutory provision grandfathers all contracts in existence as of February 8, 1996 (the date of enactment).¹⁶ Oncor concurs with this tentative conclusion. However, it does not go far enough. Whatever rights the BOCs ultimately are determined to possess regarding negotiations with location providers and interexchange carrier selections, those rights should not be interpreted in a manner which impair the obligation of contracts. Properly-executed agreements between location providers, pay telephone service providers and interexchange carriers remain binding and enforceable throughout the terms of those agreements. Nothing in the 1996 Act or its legislative history reflects any intent by Congress that contractual rights borne of such agreements should be negated by unilateral decisions of BOCs either to commence new negotiations with location providers during contract terms or to displace carriers selected by location owners pursuant to such contracts. Whatever rights BOCs may have regarding pay telephone carrier selection must

¹⁵47 U.S.C. § 276(b)(3) (emphasis added).

¹⁶Notice, *supra* at ¶ 73.

remain subservient to existing contractual rights. Moreover, the obligation to honor such contractual rights should not be dependent upon whether those contracts were executed prior to February 8, 1996.

Closely-related to the question of contractual terms is the issue of what constitutes a binding contractual agreement within the ambit of Section 276. Oncor shares the Commission's view that the concept of "contract" contained in Section 276 encompasses any lawful agreement where the parties intend to be bound.¹⁷ Valid and binding contracts may take many forms. Letters of authorization (sometimes called "LOAs") qualify as contracts entitled to recognition under Section 276. LOAs are binding; they impose mutual obligations on each party (*i.e.*, the interexchange carrier and the location owner); they are supported by consideration. Those LOAs which contain the essential elements of contracts are binding and enforceable throughout their duration, and should not be impaired or voided by BOC actions taken in reliance upon Section 276.

¹⁷*Id.*

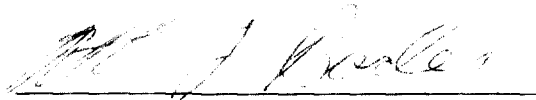
Comments of Oncor Communications, Inc.
July 1, 1996

CONCLUSION

For the reasons discussed in these comments, Oncor respectfully urges the Commission to promulgate pay telephone regulations consistent with the views expressed herein.

Respectfully submitted,

ONCOR COMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "*Comments of Oncor, Inc.*" in Docket 96-128. was served this 1st day of July, 1996, via hand delivery, upon the following:

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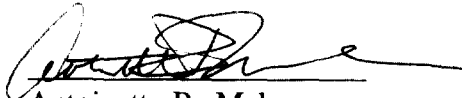
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